A

JEVA SUBRAMANIAM & ANOR

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
RAUS SHARIF JCA
AHMAD MAAROP JCA
[CRIMINAL APPEAL NOS: A-05-34-2004 & A-05-35-2004]

C

3 NOVEMBER 2008

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Delivery of drugs, whether a question of fact and degree - Whether sale of drugs dependent upon physical delivery*

D

of drugs to buyer and payment of price

CRIMINAL LAW: *Penal Code - Section 34 - Common intention - Elements of*

CRIMINAL PROCEDURE: *Judgment - Contents of - Failure of trial*

E

judge to specifically state prosecution had proved its case beyond a reasonable doubt - Whether a misdirection - Judgment stating that defence had not cast a reasonable doubt - Whether sufficient direction

EVIDENCE: *Agent provocateur - Admissibility of evidence - Statements*

F

made to agent provocateur - Whether admissible

EVIDENCE: *Agent provocateur - Definition of - Test for determining whether a person is an agent provocateur - Whether a person may be an agent provocateur in respect of one accused in a transaction and not an*

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agent provocateur in respect of another accused in the same transaction - Dangerous Drugs Act 1952, s. 40A

Both the accused persons had been convicted of an offence under s. 39B(1)(a) of the Dangerous Drugs Act ('the Act') read with s. 34 of the Penal Code and sentenced to death. They appealed

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against their conviction to the Court of Appeal. The evidence on record revealed *inter alia* the following: (a) one police detective sergeant Busra ('PW4') had acted as *agent provocateur* in the drugs transaction that led to the arrest of both the accused; (b) PW4 had been introduced to the first accused by an informer and had

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entered into negotiations with the first accused for the purchase of drugs; (c) PW4 showed the first accused the money for the drugs after which the first accused made a telephone call and both

PW4 and the first accused then moved to a petrol station; (d) at the petrol station a motorcar driven by the second accused arrived which prompted the first accused to inform PW4 that the 'barang' ('thing or item') had arrived; (e) at the first accused's invitation, PW4 followed him to the car where he asked the second accused 'mana barang?' ('where is the thing or item') whereupon the second accused responded by saying that it was in the car and pointed towards the car; (f) PW4 opened the car door and saw a paper bag containing two plastic bags, each containing compressed substance later found to be drugs; (g) the first accused then asked PW4 for the money and PW4 told the first accused to wait while he went to fetch it from his car; (h) as he was walking away, PW4 signalled a police team that was lying in wait which then rushed in and arrested both the accused persons. In the Court of Appeal, counsel for the second accused submitted: (i) that the prosecution had failed to establish common intention on the part of the second accused; (ii) the statements made by the second accused were inadmissible under s. 37A of the Act since PW4 was not of the rank or above the rank of police Inspector; (iii) the provisions of s. 40A of the Act did not apply to the facts; and (iv) PW4 was not an *agent provocateur* in relation to the second accused. Counsel for the first accused submitted: (a) there had been no delivery of the drugs and therefore there was no sale of drugs in the instant case; (b) the trial judge had failed to record in his judgment that the prosecution had proved its case beyond a reasonable doubt.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) An agent provocateur is a person who without the protection given by s. 40A of the Act would be *particeps criminis* and whose evidence would require corroboration. There is no question of a person being an agent provocateur in respect of one accused in a transaction and not an agent provocateur in respect of another accused in the same transaction. Whether a person is an agent provocateur must be determined in relation to the offence which he abets or attempts to abet in terms of s. 40A sub-section (1) of the Act. Whether there is abetment or attempt to abet depends on the facts of each case. (para 6)

(2) In the instant case, the negotiations, the agreement to sell, and the arrival of the second accused driving the first accused's car were all part and parcel of the same transaction. It was in respect of that transaction that PW4 was an agent provocateur. PW4 was an agent provocateur in respect of the offence of trafficking alleged against both accused. The statement made by the second accused to PW4 was therefore legally admissible. It was correctly received in evidence and acted upon by the learned trial judge. The weight lent to the statement coupled with other evidence in the case established that the second accused did have *mens rea* possession of the drugs in question. (para 6)

(3) In the instant case, the second accused drove the car containing the drugs to the petrol station. He knew that the drugs were in the car as evidenced by his statement to PW4. There was thus sufficient cogent evidence of presence and participation in the commission of the offence – elements required under s. 34 of the Penal Code. *Barendra Kumar Ghosh v. The King-Emperor* AIR (refd); *Mahbub Shah v. King-Emperor* AIR (refd); *Sabarudin Non v. PP* (refd). (para 6)

(4) Whether there is delivery of drugs in a given case is a question of fact and of degree. It all depends on the circumstances of each case. In instant case, the act of presenting the drugs to PW4 in the manner described in the judgment clearly denoted delivery of the same to the witness. On a consideration of the totality of the evidence including the conversation between PW4 and the first accused as well as the conduct of the second accused, there was a sale of drugs to PW4. It did not matter that the drugs were not physically handed to PW4. It also did not matter that the price was not paid for it. *PP v. Sa'ari Jusoh* (refd). (para 7)

(5) There were passages in the High Court's judgment where the trial judge had said that the defence had not cast a reasonable doubt in his mind. This was a sufficient direction. No set formula was necessary. When the High Court's judgment was read as a whole, it was abundantly clear that the trial Judge was fully conscious of the nature of the burden and standard that lay upon the prosecution. (para 9)

(6) The credibility of a particular witness and the weight to be given to his or her evidence is manifestly within the province of a trial judge. His views on such matters are entitled to great respect. An appellate court will not readily disturb his finding of facts. *Andy bin Bagindah v. PP* (refd). (para 10)

Bahasa Malaysia *Translation Of Headnotes*

Kedua pihak tertuduh telah disabitkan dengan kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya ('Akta tersebut') dibaca bersama dengan s. 34 Kanun Keseksaan dan dikenakan hukuman mati. Mereka telah merayu kepada Mahkamah Rayuan terhadap hukuman tersebut. Keterangan atas rekod antara lain menunjukkan seperti berikut: (a) seorang detektif sarjan polis bernama Busra ('PW4') telah bertindak sebagai agen provokatur dalam transaksi dadah yang membawa kepada penangkapan kedua-dua pihak tertuduh; (b) PW4 diperkenalkan oleh seorang informer kepada tertuduh pertama dan telah memasuki rundingan dengannya untuk membeli dadah; (c) PW4 telah menunjukkan kepada tertuduh pertama wang bagi dadah tersebut selepas mana tertuduh pertama telah membuat satu panggilan telefon dan kedua-dua pihak tertuduh pertama dan PW4 kemudian pergi ke sebuah stesen petrol; (d) di stesen petrol tersebut, sebuah kereta yang dipandu oleh tertuduh kedua telah memandu masuk dan tertuduh pertama telah memberitahu PW4 bahawa 'barang' ('benda atau perkara') telah sampai; (e) atas permintaan yang tertuduh pertama, PW4 telah mengikutinya ke kereta tersebut dimana tertuduh kedua ditanya soalan 'mana barang?' ('dimana benda atau perkara itu') di mana tertuduh kedua menjawab bahawa ianya berada di dalam kereta dan menunjuk kepada kereta; (f) PW4 kemudian membuka pintu kereta dan telah melihat satu beg kertas yang mengandungi dua beg plastik, setiap satu mengandungi bahan yang dimampatkan, yang kemudiannya dikenal pasti sebagai dadah; (g) tertuduh pertama kemudiannya telah meminta wang daripada PW4 yang telah memintanya menunggu sementara beliau pergi untuk mendapatkannya daripada kereta; (h) sewaktu PW4 berjalan menuju keretanya, beliau telah memberi isyarat kepada satu pasukan polis yang sedang menunggu dimana pasukan polis tersebut kemudian menangkap kedua-dua pihak tertuduh. Di Mahkamah Rayuan, peguam bagi pihak tertuduh kedua telah berhujah: (i) bahawa pihak pendakwaraya gagal membuktikan niat bersama di pihak tertuduh kedua, (ii) bahawa kenyataan-kenyataan yang diberikan oleh tertuduh kedua tidak boleh diterimamasuk di

A bawah s. 37A Akta tersebut kerana PW4 tidak berpangkat ataupun tidak berpangkat lebih tinggi daripada Inspektor Polis; (iii) bahawa peruntukan s. 40A Akta tersebut tidak terpakai kepada fakta kes; dan (iv) bahawa PW4 bukanlah agen provokatur setakat yang berkaitan dengan pihak tertuduh kedua. Peguam bagi
B tertuduh pertama pula berhujah: (a) bahawa oleh kerana dadah tersebut tidak diserahkan maka tiada jualan telah disempurnakan di dalam kes ini; (b) bahawa hakim yang bijaksana dalam kes ini gagal untuk merekodkan dalam penghakimannya bahawa pihak pendakwaraya telah membuktikan kesnya melepasi keraguan
C munasabah.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

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(1) Agen provokatur adalah seorang yang tanpa perlindungan yang diberikan di bawah s 40 Akta tersebut akan menjadi *particeps criminis* dan keterangannya memerlukan sokongan. Seseorang tidak boleh menjadi agen provokatur bagi seorang tertuduh
E tetapi bukan bagi tertuduh yang lain dalam satu transaksi yang sama. Soalan sama ada seorang merupakan agen provokatur mesti diputuskan berdasarkan kesalahan yang beliau dikatakan bersubahat atau cuba bersubahat berdasarkan s. 40A sub-seksyen (1) Akta tersebut. Sama ada ianya merupakan
F tindakan bersubahat atau percubaan untuk bersubahat akan bergantung kepada fakta setiap kes.

(2) Dalam kes semasa, rundingan, kesanggupan untuk menjual dan ketibaan yang tertuduh kedua memandu kereta yang tertuduh pertama, kesemuanya merupakan sebahagian dari dan
G membentuk transaksi yang sama. PW4 merupakan agen provokatur dalam transaksi tersebut. PW4 merupakan agen provokatur berkaitan dengan kesalahan pengedaran dadah yang didakwa terhadap kedua-dua pihak tertuduh. Maka kenyataan yang telah dibuat oleh tertuduh kedua kepada PW4 boleh
H diterimamasuk mengikut undang-undang. Ia telah dengan betulnya diterimamasuk dan diberikan pergantungan oleh hakim. Kepentingan yang diberikan kepada kenyataan tersebut apabila dilihat bersama dengan keterangan lain dalam kes ini membuktikan bahawa tertuduh kedua mempunyai *mens rea*
I milikan dadah tersebut.

(3) Dalam kes semasa, tertuduh kedua telah memandu kereta yang mengandungi dadah tersebut ke stesen petrol. Dia mempunyai pengetahuan bahawa dadah tersebut berada di dalam kereta sepertimana diakui di dalam kenyataannya kepada PW4. Maka terdapat bukti jelas yang mencukupi untuk menunjukkan kehadiran dan penglibatannya di dalam kesalahan tersebut – Unsur-unsur yang perlu dibuktikan di bawah s. 34 Kanun Keseksaan. *Barendra Kumar Ghosh v. The King-Emperor* (dirujuk); *Mahbub Shah v. King-Emperor* (dirujuk)*; Sabarudin Non v. PP* (dirujuk).

(4) Persoalan sama ada terdapat penghantaran dadah dalam sesuatu kes merupakan suatu persoalan fakta dan darjah. Kesemuanya bergantung kepada keadaan setiap kes. Dalam kes semasa, perbuatan menunjukkan dadah kepada PW4, seperti yang jelas digambarkan di dalam penghakiman, menunjukkan penyerahan dadah kepada saksi. Setelah meneliti keseluruhan keterangan termasuk perbualan antara tertuduh pertama dan PW4 dan kelakuan tertuduh kedua, terdapat jualan dadah kepada PW4. Hakikat bahawa dadah tersebut tidak dihantar secara fizikal kepada PW4 tidak penting. Fakta bahawa harga bagi dadah tersebut tidak dibayar juga tidak penting. *PP v. Sa'ari Jusoh* (dirujuk).

(5) Terdapat perenggan-perenggan di dalam penghakiman Mahkamah Tinggi di mana hakim yang bijaksana telah menyatakan bahawa pasukan pembelaan telah gagal untuk mewujudkan keraguan yang munabah dalam fikirannya. Ini merupakan arahan yang mencukupi. Satu formula yang tetap tidak diperlukan. Penghakiman Mahkamah Tinggi apabila dibaca secara menyeluruh, dengan jelas menunjukkan bahawa hakim yang bijaksana sedar sepenuhnya akan keadaan beban pembuktian dan tugasan yang terletak di bahu pihak pendakwaraya.

(6) Kredibiliti seseorang saksi dan kepentingan yang harus diberikan kepada keterangannya dengan jelas terletak di tangan hakim yang mendengar kes. Pendapatnya di dalam perkara-perkara sedemikian harus dan patut menerima penghormatan yang tinggi. Sebuah mahkamah rayuan tidak akan dengan sewenang-wenangnya mengganggu dapatan faktanya. *Andy bin Bagindah v. PP* (dirujuk).

Case(s) referred to:
Andy Bagindah v. PP [2000] 3 CLJ 289 CA ***(refd)***
Barendra Kumar Ghosh v. The King-Emperor AIR [1925] Privy Council 1 ***(refd)***
Mahbub Shah v. King-Emperor AIR [1945] Privy Council 118 ***(refd)***
PP v. Sa'ari Jusoh [2007] 2 CLJ 197 FC ***(refd)***
Sabarudin Non v. PP & Other Appeals [2005] 1 CLJ 466 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 182A
Dangerous Drugs Act 1952, ss. 37A, 39B(1)(a), 40A(2)
Penal Code, s. 34

For the 1st appellant - Naran Singh; M/s Naran Singh & Co
For the 2nd appellant - Gurbachan Singh; M/s Bachan & Kartar
For the respondent - Manoj Kurup; DPP

[Appeal from High Court, Ipoh; Criminal Trial No: 45-7-2001]

Reported by Andrew Christopher Simon

JUDGMENT

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

[2] The appellants before us were convicted of an offence contrary to s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") read with s. 34 of the Penal Code. They were sentenced to the mandatory capital punishment which it carries and they have now appealed against their conviction.

[3] The facts relevant to these appeals are as follows. PW4 (Detective Sergeant Busra bin Abdul Kadir) on the instructions of his superiors acted as agent provocateur in relation to information which had been received in relation to the trafficking in dangerous drugs. On 6 September 1999 at about 2pm, PW4 received a phone call from the informer inviting him to a meeting at a coffee shop opposite Jubli Park. After having met, they proceeded to an Esso petrol station along Jalan Ampang. There, the informer agreed to arrange a meeting between PW4 and a person at the Zhu Yee Qing Restaurant which was opposite the petrol station in question. They then proceeded to the restaurant where the informer introduced PW4 to the first accused. A conversation

ensued during which the informer left. It is in evidence that PW4 and the first accused concluded negotiations for the sale and purchase of 2kg of cannabis at the price of RM1,800 per kg. According to PW4, the first accused asked for the purchase price to be shown and that he would then get the drugs across. Later, PW4 reported this matter to his superior who arranged for the sum of RM4,000 to be handed to PW4. Later still, PW4 and a team of police officers left for the restaurant in question. An ambush was laid. On arrival, PW4 saw the first accused waiting. The latter asked the former about the money. PW4 showed the first accused the money whereupon the first accused asked him to keep it while he made a call to his friend to bring the drugs. At that point the first accused made a telephone call on his mobile phone. There is no evidence as to the telephone number that he called or the person he spoke to. At this juncture it must be mentioned that after the telephone call was made, both PW4 and the first accused moved across to the Esso petrol station and waited there. It is in evidence that shortly later that a motorcar number PBW 9744 arrived at the scene. It was driven by the second accused. At that point, the first accused informed PW4 that the "barang" had arrived. On the first accused's invitation PW4 followed him to the car. PW4 then asked the second accused, "mana barang?" or "where is the thing?" The second accused responded by saying that it was in the car and pointed towards the vehicle. PW4 then went to the car, opened its left front door and saw a paper bag there. He inspected it and found it to contain two plastic bags: one was black and the other blue. Each bag contained a slab of compressed substance wrapped in transparent plastic. The first accused then asked PW4 for the money. PW4 asked the first accused to wait while he fetched it from his car. While walking away, PW4 gave the pre-arranged signal at which the police party waiting in ambush emerged. Both accused were arrested. The substances recovered from the bag in question were sent for chemical examination which showed it to be 1,925 grams of cannabis. Both accused were then charged for trafficking and were convicted. So much for the facts.

[4] Before us, Mr. Gurbachan Singh of counsel for the second accused has argued that the prosecution had at the close of its case failed to establish the ingredients of a common intention on the part of his client. Learned counsel submitted that the only telling evidence against his client within the prosecution case was

A the exchange between PW4 and the second accused. To recount, PW4 had asked the second accused "mana barang?" and the second accused had responded by saying that it was in the car and pointed to the car in question. Learned counsel's argument is that the statements made by his client, including the act of
B pointing, was clearly inadmissible under s. 37A of the Act because PW4 was not an officer of or above the rank of police inspector. Learned counsel further argued that this is not a case where section 40A(2) of the Act applies.

C **[5]** It is the argument of the second accused that PW4 was not an agent provocateur *vis a vis* himself. In other words, whilst PW4 may have been an agent provocateur in respect of the first accused, he was not an agent provocateur in respect of the second. With respect, we are unable to agree with this submission.
D The terms of the section are clear enough. Section 40A of the Act provides:

> (1) Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, no agent provocateur shall be presumed to be unworthy of credit by reason only of his
E having attempted to abet or abetted the commission of an offence by any person under this Act if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.
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> (2) Notwithstanding any rule of law or the provisions of this Act
F or any other written law to the contrary, and that the agent provocateur is a police officer whatever his rank or any officer of customs, any statement, whether oral or in writing made to an agent provocateur by any person who subsequently is charged with an offence under this Act shall be admissible as evidence at
G his trial.

[6] The first sub section provides for the protection against unworthiness of credit on the part of an agent provocateur for having attempted to abet or having abetted the commission of an
H offence under the Act. So, it is plain enough that an agent provocateur is one who but for the section would be *participes criminis*, whose evidence would require corroboration. In our view, there is no question of a person being an agent provocateur in respect of one accused in a transaction and not an agent
I provocateur in respect of another accused in respect of the same transaction. Whether a person is an agent provocateur must be

determined in relation to the offence which he abets or attempts to abet in terms of the first sub-section. Whether there is abetment or attempt to abet depends on facts of each case. On the facts of the present case, the negotiations, the agreement to sell, the arrival of the second accused driving the first accused's car are all part and parcel of the same transaction. It is in respect of that transaction that PW4 was an agent provocateur. Put differently, PW4 was an agent provocateur in respect of the offence of trafficking alleged against both accused. The statement made by the second accused to PW4 is, in our judgment, legally admissible. It was therefore correctly received in evidence and acted upon by the learned trial judge. Once admitted, the weight to be lent to the statement coupled with other evidence in this case goes to establish that the second accused did have mens rea possession of the drugs in question. To summarize, the second accused drove the car containing the drugs thereby transporting it to the petrol station in question. He knew that the drug was in the car as evidenced by his statement to PW4. Accordingly, there is, on the facts of this case, sufficient cogent evidence of presence and participation in the commission of the offence which are the elements required under s. 34 of the Penal Code. See *Barendra Kumar Ghosh v. The King-Emperor* AIR [1925] Privy Council 1; *Mahbub Shah v. King-Emperor* AIR [1945] Privy Council 118. See also the judgment of this court in *Sabarudin Non v. PP & Other Appeals* [2005] 1 CLJ 466.

[7] As regards the first accused, his learned counsel Mr Naran Singh submitted that there had been no delivery and therefore there was no sale of drugs in the present case. He submitted that at best his client had only possession of the drugs in question. In support of his argument learned counsel relied on the decision of Federal Court in *PP v. Sa'ari Jusoh* [2007] 2 CLJ 197. In that case it was held by the Federal Court that there must be an actual delivery of the proscribed drugs. In our judgment, whether there is delivery in a given case is a question of fact and of degree. It all depends on the circumstances of each case. In the present instance, the act of presenting the drugs to PW4 in the manner described earlier in this judgment clearly denotes delivery of the same to the witness. Accordingly, we are satisfied on a consideration of the totality of the evidence including the conversation between PW4 and the first accused as well as the conduct of the second accused already adverted to, that there is

A a sale of drugs to PW4. It did not matter, on the facts before us that the drug was not physically handed to PW4. It also does not matter that the price was not paid for it.

[8] The second ground addressed by counsel for the first B accused is that the learned judge misdirected himself by not holding that the prosecution had not made out a case beyond reasonable doubt at the conclusion of the whole case. Our attention was directed to s. 182A of the Criminal Procedure Code which provides as follows:

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> (1) At the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
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> (2) If the court finds that the prosecution has proved its case D beyond reasonable doubt, the court shall find the accused guilty and he may be convicted on it.
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> (3) If the court finds that the prosecution has not proved its case beyond reasonable doubt, the court shall record an order of acquittal.

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[9] The complaint here is that the learned trial judge did not anywhere in his judgment record a finding – to quote from the second sub section – that the prosecution had proved its case beyond a reasonable doubt. We have scrutinized the judgment F under appeal with great care and we find passages therein where the learned judge has said that the defence had not cast a reasonable doubt in his mind. He said this when considering the evidence presented to him by the defence. In our judgment, this is a sufficient direction. It is not necessary for a trial judge to G recite in a parrot like fashion in every case that he or she finds that the prosecution had proved its case beyond a reasonable doubt. Accordingly, no set formula is called for. Suffice that when the judgment when read as a whole, it makes it abundantly clear that the judge was fully conscious of the nature of burden and H standard that lay upon the prosecution. That appears quite clear to us from the judgment under appeal here. There is therefore nothing in the second submission.

[10] In the course of argument, several complaints were made about the way in which witnesses for the defence particularly by I the second accused were evaluated. The credibility of a particular witness and the weight to be given to his or her evidence is

manifestly within the province of a trial judge. His views on such matters are entitled to great respect. An appellate court will not readily disturb his finding of facts. See *Andy Bagindah v. PP* [2000] 3 CLJ 289.

[11] For the reasons already given, we are of the opinion that these appeals are without merit. Having carefully scrutinized the judgment under appeal and the evidence before the High Court, we are satisfied that the conviction of both the accused is entirely safe. The appeals are therefore dismissed and sentence of death passed on each accused affirmed.